88-266

No._____

In The
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF OKLAHOMA, *ex rel.*,
OKLAHOMA TAX COMMISSION, PETITIONER

v.

JAN GRAHAM, *et al.*, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PRELIMINARY MATTER

QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals err in determining that removal jurisdiction was proper for an action brought against an Indian tribe in state court?

2. Does tribal sovereign immunity prohibit an action brought by the State to enforce the collection and remittance requirements of its tax laws on commercial activities conducted by an Indian tribe on off-reservation lands?

LIST OF PARTIES

The Petitioner is the State of Oklahoma, ex rel., Oklahoma Tax Commission.

The Respondents are Jan Graham and the Chickasaw Nation.

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JAN GRAHAM, *et al.*, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, State of Oklahoma, ex rel., Oklahoma Tax Commission, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on May 18, 1988.

OPINIONS BELOW

The order and judgment of the Court of Appeals, which is reported at 846 F.2d 1258, appears in Appendix A. The Order of this Court, which is reported at 108 S.Ct. 481, appears in Appendix B. The orders of the United States District Court for the Eastern District of Oklahoma, which are unreported, appear in Appendices D, E, and F.

JURISDICTION

The order and judgment of the Court of Appeals was entered on May 18, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Title 28 United States Code §1441(a) and (b) are set forth at Appendix I.

Title 25 United States Code §§465 and 501 are set forth at Appendix G and H respectively. The relevant State taxing statutes, 68 Oklahoma Statutes §§232, 302, 302-1(a), 302-2(a), 302-3(a) and 1354 1(A), (E), (L) and (M) are set forth at Appendices J through O.

STATEMENT OF THE CASE

1. Nature of the Controversy.

The Chickasaw Nation (Tribe) conducts high stakes bingo games and sells cigarettes at a motel within the city limits of Sulphur, Oklahoma. The motel was purchased by the Chickasaw Nation from the Small Business Administration in 1972. The premises were conveyed to the United States of America in trust for the Tribe in August 1985 pursuant to the provisions of 25 U.S.C. §501 and 25 U.S.C. §465.

Oklahoma law requires vendors to collect and remit sales tax on bingo sales and cigarettes as well as on other items. 68 Okla. Stat. §1354. In addition, cigarette excise taxes are imposed on the consumer/user of cigarettes. 68 Okla. Stat. §§302, 302-1(a), 302-2(a) and 302-3(a). Payment of the cigarette excise tax is evidenced by stamps purchased by the vendor and affixed to each package of cigarettes sold. 68 Okla. Stat. §302. Failure of a vendor to collect and remit state sales tax or to affix cigarette excise tax stamps to packages of cigarettes is grounds for seeking injunctive relief. 68 Okla. Stat. §232.

The Chickasaw Nation has neither collected and remitted state sales tax from its customers nor purchased and affixed state cigarette excise tax stamps to the packages of cigarettes sold.

2. The Proceedings Below.

The State brought an action in state court for injunctive relief against the Chickasaw Nation and its motel manager, Jan Graham, alleging that state taxes were not being collected and remitted in accordance with state law. The cause was removed to the United

States District Court for the Eastern District of Oklahoma by Jan Graham and the Chickasaw Nation pursuant to 28 U.S.C. §1441. The District Court, in denying the State's motion to remand, relied on *Montana v. Blackfeet Tribe of Indians*, 471 U.S.759 (1985) and found that an action to enforce state revenue statutes against activities of a federally recognized Indian tribe raised a federal question giving the court removal jurisdiction. App. D. The District Court then granted the motion to dismiss filed by Jan Graham and the Chickasaw Nation on the grounds of tribal sovereign immunity from unconsented suit without addressing the status of the land on which the commercial activities occurred. App. E. The State's motion for reconsideration was subsequently denied and the State appealed. App. F.

On appeal the Tenth Circuit affirmed the lower decisions finding "that removal was proper because of the constitutional grant of federal jurisdiction over Indian affairs," App. C, Page A-14 and, applying reservation case law to this off-reservation situation, held that tribal sovereign immunity barred this action against both Jan Graham and the Chickasaw Nation. App. C, Pages A-15 to A-16.

The Oklahoma Tax Commission then petitioned this Court for writ of certiorari to issue in order to review the decision of the Appeals Court. The Commission's petition was granted on December 7, 1987, App. B, and the judgment of the Appeals Court was vacated. The case was then remanded back to the Tenth Circuit for further consideration in light of *Caterpillar, Inc. v. Wiliams*, 482 U.S.___, 107 S.Ct. 2425 (1987).

On remand, the Tenth Circuit reasserted its previous opinion holding that removal jurisdiction was proper and the opinion in *Caterpillar* was inapposite to this case, App. A, Page A-2. The Tenth Circuit also reaffirmed its holding that the Tax Commission's suit was barred by tribal sovereign immunity.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit Court of Appeals has rendered a decision which is in conflict with applicable decisions of this Court. The Appeals Court has refused to apply the holding in the *Caterpillar*

case and has reasserted the opinion that this Court previously vacated. Also, the Appeals Court has barred this lawsuit against the Chickasaw Nation on a strict sovereign immunity theory that has been rejected by this Court and the Supreme Court of the State of Oklahoma. Because the Tenth Circuit has decided a federal question in conflict with applicable decisions of this Court, review by this Court is urgently required.

I. THE DECISION BELOW IMPROPERLY AFFIRMED REMOVAL JURISDICTION IN THE FEDERAL COURT, OF A CLAIM ARISING UNDER STATE LAW.

After instructions to reconsider this case in light of *Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425 (1987) the lower court concluded that the State's complaint constituted an effort to avoid the sovereign immunity of the Tribe which is an inherent, although unstated, federal question within the pleading and therefore *Caterpillar* is inapposite and removal was proper. However, *Caterpillar* is controlling authority for removal jurisdiction in federal courts and the Tenth Circuit improperly disregarded its application to this case.

The Appeals Court has seized upon the Tribes defense of sovereign immunity contained in its Motion to Dismiss in order to grant the Tribe's removal petition from state court. This method of gaining removal jurisdiction based on the defense to the State's complaint is contrary to this Court's holding in *Caterpillar*.

In this case, the Oklahoma Tax Commission seeks to enforce its sales tax and cigarette tax laws against the Tribe's business enterprise. The Petition filed in State District Court by the Tax Commission alleges that State laws are being violated and prays for the remedy provided by State law for those violations. The face of the State's Petition is absolutely void of any reliance on federal law, which is logical in view of the fact that federal law provides no remedy for the collection of a state's taxes. Since the only remedy available to the Tax Commission is provided by State law, this action could not have been originally brought in the Federal District Court.

In defense of the State's action, the Tribe motioned to dismiss based on sovereign immunity. It is upon this defense that the Tenth

Circuit predicated removal jurisdiction by reasoning that the State was required to somehow anticipate this defense and overcome it in the original pleading. The State's failure to address this defense rendered the petition "not well plead" and the Tribe was allowed to inject the defense as a jurisdictional basis for removal.

This novel method of gaining federal question jurisdiction is not allowed under the decisions of this Court which require that a federal question must be presented upon the face of the plaintiff's properly pleaded complaint before a case can be removed from state to federal court. It is only after the removal petition is properly granted that issues contained in a motion to dismiss in defending the lawsuit may be considered and litigated in the federal forum. In the *Caterpillar* case this Court held:

> [T]he presence of a federal question . . . in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court . . . But the defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in whch the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing. Congress has long since decided that federal defenses do not provide a basis for removal.

This Court's recent holding in the *Caterpillar* case did not establish new theories of law but, rather, was based on previous Supreme Court precedent and federal law dating back to 1887. In the case of *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983), cited in *Caterpillar*, this Court held at 13-14:

> For appellant's first cause of action—to enforce its levy, under §18818—a straightforward application of the well-pleaded complaint rule precludes original

> federal-court jurisdiction. California law establishes a set of conditions, without reference to federal law, under which a tax levy may be enforced; federal law becomes relevant only by way of a defense to an obligation created entirely by state law, and then only if appellant has made out a valid claim for relief under state law . . . The well-pleaded complaint rule was framed to deal with precisely such a situation. As we discussed above, since 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.

This Court went on to say that the party who brings a suit is master to decide what law he will rely upon but it is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint. However, in cases involving state taxation, the Court has found that this is purely a state law matter and it is impossible to plead a federal question in this context.

The Court addressed the state taxation issue in *Gully v. First National Bank*, 299 U.S. 109 (1936). In this case the State of Mississippi sued a federally chartered bank in state court for collection of taxes. The Defendant removed the case to federal court where it was accepted based on federal question jurisdiction. The lower courts ruled upon the ground that the power to lay a tax upon the shares of national banks has its origin and measure in the provisions of a federal statute, and that by necessary implication a plaintiff counts upon the statute in suing for the tax. This Court held that the case was improperly removed from state court and ruled at 299 U.S. 112:

> To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.

> A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal . . . Indeed, the complaint itself will not avail as a basis of jurisdiction insofar as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense.

At 116 this Court concluded that:

> The federal nature of the right to be established is decisive—not the source of the authority to establish it. Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because it is prohibited thereby.

The rulings of this Court in the *Gully* case clearly set forth the uncompromising limitations that have been placed on federal court jurisdiction. It is conceded that a trial on the merits of this case would involve litigation of federal questions. However, not every question of federal law emerging in a suit is proof that a federal law is the *basis* of the suit. When a question of federal law lurks in the background of a lawsuit, as it does in this case, the dispute is so conjectural, and so far removed from plain necessity, that it is unavailing to extinguish the jurisdiction of the State Court.

The opinion in *Gully* explains that a mechanical application of the rules of removal jurisdiction will not always yield the proper result because, to define broadly and in the abstract "a case arising under the Constitution or laws of the United States" has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. The search for causes could extend backward without end. But instead, there has been a selective process which picks the substantial causes

out of the web and lays the other ones aside. As in the problems of causation, so here in the search for the underlying law. To set bounds to this pursuit of the underlying law, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. In the case at bar, the decision below has stepped out of these boundaries and into the maze from which it now must be retrieved.

As a matter of federal law, this case clearly should be remanded to the District Court of Murray County, State of Oklahoma. Nothing in the State's original petition in State Court would allow removal jurisdiction and it is plain error for the Tenth Circuit to rule that removal was proper in light of this Court's ruling in the above cited cases.

II. THE DECISION BELOW IMPROPERLY DISMISSED THE STATE'S CASE BASED ON TRIBAL SOVEREIGN IMMUNITY

In this case, the State is attempting to enforce state sales tax and cigarette tax laws upon the Tribe's business enterprise. *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, and *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 are cases which stand for the holding that the State has the right to require the Tribe to collect these taxes on the State's behalf. However, this goes to the merits of the case which have not been heard because the lower courts have found a way to avoid this result by a procedural ruling which holds that a state may not sue an Indian tribe under a strict sovereign immunity theory. Under the lower court's theory, a state may have the right to have its taxes collected, but if a tribe disregards this right and positively refuses to collect and remit the State's taxes, the state is barred from seeking a remedy to enforce that right. The state would submit that a right without a remedy is certainly no right at all. If this is the law, the trilogy of cases cited above are merely an idealistic policy statement rather than a determination of law.

The Tenth Circuit reasserted its prior ruling in their recent opinion at A-1, and cited its vacated opinion located in the Appendix at A-9, for the holding that the Tribe is immune from suit, thus barring the

State's claim. The Tenth Circuit's authority is a citation to *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 for the ruling at A-15 that:

> The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.
>
> * * *
>
> Although the sovereign immunity enjoyed by tribes is not absolute, we may infer state authority only "where Congress has expressly provided that state laws shall apply." *McClanahan, 411 U.S. at 171*. Hence, tribal sovereign immunity prohibits suit *against* Indian nations without Congressional authorization.

Safe in the knowledge that Congress had not authorized this lawsuit, the Tenth Circuit affirmed the dismissal of the State's action. However, the Tenth Circuit's reliance on *McClanahan* was misplaced.

This Court closely tailored the decision in *McClanahan* to the specific facts of that case. At 411 U.S. 167-168 this Court stated:

> It may be helpful to begin our discussion of the law applicable to this complex area with a brief statement of what this case does not involve. We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government. See e.g., *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962), *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). Nor are we concerned with exertions of state sovereignty over non-Indians who undertake activity on Indian reservations. See, e.g. *Thomas v. Gay*, 169 U.S. 264 (1898) . . . Nor, finally, is this a case where the State seeks to reach activity undertaken by reservation Indians on nonreservation lands.

> See e.g., *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). Rather, this case involves the narrow question whether the State may tax a reservation Indian for income earned exclusively on the reservation.

The *McClanahan* case also speaks directly to the issue of tribal sovereignty in Oklahoma and cities the *Oklahoma Tax Commission* case with approval at *411 U.S. 171*.

> As noted above, the [Indian sovereignty] doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community. See e.g. *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943).
>
> * * *
>
> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).
>
> * * *
>
> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.

The crucial language in the McClanahan decision comes at p. 181 where this Court ultimately rules that:

> This Court has therefore held that "the question has always been whether the state action infringed on the right of *reservation Indians* to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217 (1959) at 220.

The decision below is therefore in conflict with this Court's opinion in *McClanahan*, in that the Indian sovereignty doctrine is not a bar to this suit. However, the decision below is in need of review

not only for its error, but because it has caused a split of opinion between the Tenth Circuit and the Supreme Court of the State of Oklahoma. The Oklahoma Supreme Court has ruled on this issue in *State Ex Rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985). In *Seneca-Cayuga*, the State Supreme Court also relied on *McClanahan* for fits holding at 711 P.2d 84:

> Although some adherence to the immunity doctrine continues, the strict territorial approach applied earlier has largely given way to two other tests developed by the United States Supreme Court since 1959 for assessment of Indian Country's amenability to state law: infringement upon tribal self-government and pre-emption by federal action.
>
> The infringement test allows state jurisdiction in cases not involving tribal self-government. Pre-emption analysis recognizes inherent Indian sovereignty as " backdrop against which the applicable treaties and federal statutes must be read," but focuses on whether the state has been granted jurisdiction by the federal government.

The State Supreme Court concluded that tribal sovereignty is not a bar to state jurisdiction in Oklahoma, although the State must meet the modern tests for measuring infringement upon tribal self-government and federal pre-emption.

The Tenth Circuit opinion below has selectively applied language in cases pertaining to reservation states to conclude that the State of Oklahoma is wholly without jurisdiction to even bring suit against an Indian tribe to litigate the issue of taxes. However, this Court has determined in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 at 602-603, that the theory that Indian tribes are separate political entities with all the rights of independent status is a condition which has not existed for many years in the State of Oklahoma. Also, the Court found that the underlying principles on which the reservation decisions are based do not fit the situation of the Oklahoma Indians. This Court recognized then that Oklahoma was distinguishable from the reservation states because Oklahoma is an

assimilated State and for all practical purposes, Indian citizens of this State are indistinguishable from all other citizens.[1]

The assimilation of the Indians of Oklahoma into the general community of this State has been recognized by all three branches of federal government and this State has been afforded separate treatment for that reason.[2] Although Oklahoma has a long and proud tradition of Indian heritage, and an estimated one-third of all Indians in the United States live in Oklahoma, the non-Indian population is so much greater and non-Indian culture has been disseminated to such an

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1 *Oklahoma Tax Commission v. United States* is still the law in Oklahoma as it has not only been cited with approval in *McClanahan* but was followed in *West v. Oklahoma Tax Commission*, 334 U.S. 717 (1948) and was strongly embraced in *United States v. Mason*, 412 U.S. 391 (1973).

2 Besides the decision of this Court already mentioned, the case of *Woodward v. DeGraffenreid*, 238 U.S. 284 (1915) offers an extensive discussion of the effects of the Curtis Act and the Dawes Commission upon Indians in Oklahoma and the organization of the territory into the State of Oklahoma. Included in this decision is the citation to the Dawes Commission's yearly reports to Congress and Congressional Committee reports detailing the legislative history of Congressional action culminating in Oklahoma statehood. The legislative history of Congressional Acts which opened the territories for settlement, disestablished the reservations, and organized the territory for statehood is a point that needs to be more fully briefed. However, as pointed out in the State's previous petition to this Court, Case No. 87-635, note 5, Congress recognizes that Oklahoma is not a reservation state.

In the executive branch, the U.S. Department of Commerce, in its handbook entitled *Federal and State Indian Reservations and Indian Trust Areas* (1973), C 1.8/3: In2), made the following note in the Oklahoma section of the handbook:

> The Indian land status in Oklahoma is unique in comparison with Indian lands elsewhere. Because of special laws related to Indian owned land in Oklahoma, there are no reservations in that state, insofar as the term generally applies to Indian lands in other parts of the United States. The members of the 27 tribes mentioned herein have been assimilated to such a degree that any statement made in reference to tribal economy, transportation, climate, community facilities, and recreation would reflect the status of the non-Indian community. Therefore, these headings have been omitted from the Oklahoma portion of this handbook.

extent, that the Indian character of the former reservation lands in Oklahoma has been extinguished.[3] The traditional solicitude of the Indian tribes no longer exists in Oklahoma. The affairs of the tribe necessarily touch and concern the entire community since the two are inseparable. Therefore, State jurisdiction should obtain or else no satisfactory administration of any law could be maintained in any practical application.

The particular circumstances of the formation of Oklahoma into a state, including the legendary land runs which brought floods of white settlers to the state and the forced allotment of all reservations, inter alia, underscore the reasoning behind this Court's opinion in *Oklahoma Tax Commission v. United States*, supra, where the State's tax collection efforts were enforced. The Court held at 319 U.S. 608:

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3 Population statistics regarding Indians in Oklahoma bear out this observation. The U.S. Department of Commerce, Bureau of the Census, compiled results of the 1980 Dicennial Census in the handbook, *American Indians, Eskimos, and Aluets on Identified Reservations and in the Historic Areas of Oklahoma (Excluding Urbanized Areas) 1980 Census of Population.* The Bureau noted at page VIII of the publication:

> The historic areas of Oklahoma (excluding urbanized areas) consist of the former reservations which had legally established boundaries during the period 1900-1907. These reservations were dissolved during the two-to-three year period preceding the statehood of Oklahoma in 1907.

It has been estimated that the Indian population in Oklahoma is approximately 175,000. In the publication cited above, the Indian population in the Historic Areas of Oklahoma (excluding urbanized area), reported in table 13, pg. 99, totals 113,367 of which 57,837 are enrolled tribal members. This can be compared with the total population in Oklahoma of 3,301,000 from the *Statistical Abstract of the United States*, 1987. These statistics demonstrate the predominance of the non-Indian society within the state and the consequent assimilation of the Indians into that society. This Court has used indicators such as the tenor of legislative reports, surrounding circumstances and demographics to sort out state and tribal jurisdictional problems in *Solem v. Bartlett*, 465 U.S. 463 (1984). These jurisdictional problems are quite complex in Oklahoma due to the lack of any reservation boundry and the checkerboard of isolated tracts of Indian allotments across the State. See also the map of *Indian Lands and Related Facilities* as of 1971, compiled by the Bureau of Indian Affairs in cooperation with the Geological Survey, U.S. Department of Interior which identifies the "former reservations in Oklahoma."

Congress has passed laws under which Indians have become full fledged citizens of the State of Oklahoma. Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more. Since Oklahoma has become a state, it has been authoritatively stated that tax losses resulting from tax immunity of Indians have totaled more than $125,000,000, a sum only slightly less than the bonded indebtedness of the state. If Congress intended to relieve these Indians from the burden of a state inheritance tax as a consequence of our national policy toward Indians, there is still no reason why we should imply that it intended the burden to be borne so heavily by one state. But there is a complete absence of any evidence of congressional belief that these exemptions are required on equitable grounds, no matter on which sovereign the burden falls. Here is a tax based solely on ability to pay. "Only the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians?" *The Cherokee Tobacco*, supra, 11 Wall. page 621, 20 L. Ed. 227. Recog-nizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, permitted States to impose income taxes upon government employees and *Helvering v. Gerhardt*, 304 U.S. 405, permitted the federal government to impose taxes on state employees. *O'Malley v. Woodrough*, 307 U.S. 277, overruled a previous decision which held that judges should not pay taxes just as other citizens, and *Helvering v. Mountain Producers Oil Corp.*, supra, repudiated former

decisions seriously limiting state and federal power to tax. See, also, *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, and *James v. Dravo Contracting Co.*, 302 U.S. 134. The trend of these cases should not now be reversed.

The situation that exists in Oklahoma which spawned this litigation is that, recently, some of the forty different Indian Tribes in Oklahoma have separately embarked on a program of aggressively entering the economic marketplace of the State in direct competition with private businesses. To this end, the various tribes, like the Chickasaws in this case, have purchased business properties in the commercial centers in many Oklahoms towns. These properties are then placed in trust with the United States under federal statutes and the tribes then proclaim that no State law applies to their business enterprise by force of federal law, whereupon the tribe opens for business, sans state taxes or regulation, with a significant economic advantage, albeit an artificial one, over neighboring businesses. This tribal activity, even in Indian Country within Oklahoma, has taken on a form that necessarily affects non-Indians and Indians alike, and has exerted a trenchant effect upon the general economic community of the State. The Tribe avails itself of the machinery furnished by the State and there is no reason why it should not contribute in the same proportion that every other business contributes for the privileges that it uses. It has no better or other right to use them than anyone else. "The cost of maintaining the State that makes the business possible is just as necessary an element in the cost of production as labor or coal", Justice Holmes dissent in *Panhandle Oil Co. v. Mississippi ex rel, Knox*, 277 U.S. 218 at 224.

Finally, the State urges, as it did in its first petition for cert. in this case, that this case falls within the precedent set by this Court in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) where this Court held that the Mescalero Apache Tribe's business was subject ot state taxation at 411 U.S. 148:

> Tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities . . . not on any reservation . . . Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondescriminatory state law otherwise applicable to all citizens of the State.

The Tenth Circuit's decision has foreclosed the State's ability to rely on this Court's opinions, which have previously determined that the State has the right to collect these taxes, by preventing the State's suit. The tribal sovereign immunity doctrine is not a bar to the State's suit under the applicable decisions of this Court and the Tenth Circuit's application of that doctrine was incorrect in this case. It is therefore essential that this Court review the decision below to protect the State's rights.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION, Plaintiff-Appellant, v. JAN GRAHAM and CHICKASAW NATION, by and through OVERTON JAMES, Governor of the Chickasaw Nation, Defendants-Appellees.	)	No. 86-1655

Appeal from the United States District Court
For the Eastern District of Oklahoma
D.C. No. 85-663-C

Robert C. Jenkins (J. Lawrence Blankenship with him on the briefs), Oklahoma City, Oklahoma, for Plaintiff-Appellant.

Joe Mark Elkouri, General Counsel, David Allen Miley, and Givens L. Adams of the Oklahoma Tax Commission, Oklahoma City, Oklahoma, on the brief for Plaintiff-Appellant.

Bob Rabon of Kile, Rabon and Wolf, Hugo, Oklahoma, for Defendants-Appellees.

John G. Ghostbear, Tulsa, Oklahoma, on the brief on Amicus Curiae Choctow Nation of Oklahoma, for Defendants-Appellees.

Before SEYMOUR, MOORE, and TACHA, Circuit Judges.

MOORE, Circuit Judge.

This case is again before us following remand for reconsideration in light of *Caterpillar Inc. v. Williams*, _____ U.S.____, 107 S. Ct. 2425 (1987). The question presented on remand is whether the action filed by the State of Oklahoma (State) in state court to collect taxes from the Chickasaw Nation was properly removed. We conclude that the State's complaint constituted an effort to avoid the sovereign immunity of the Chickasaw Nation because a federal question allowing removal is inherent in the pleading. We are, thus, convinced *Caterpillar* is inapposite, and we adhere to our previous disposition that removal was proper, and dismissal was warranted.[1]

In *Caterpillar*, the Supreme Court held that the defendant cannot remove a claim for breach of individual employment contracts by interjecting the collective bargaining agreement in its answer to provoke federal removal jurisdiction. The *Caterpillar* plaintiffs had sued for breach of state-law contract rights which, the Court decided, were founded on individual agreements, not "substantially dependent on analysis of a collective-bargaining agreement." *Id.* at 2431. The defendant justified removal alleging facts not present in the plaintiffs' complaint to implicate federal substantive labor law. However, the Court held the state breach of contract action could not be transformed in § 301 LMRA litigation solely upon the basis of the federal defense raised;[2] and

> [o]nly state court actions that originally could have been filed in federal court may be removed to federal court by the defendant. The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

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1 *State of Okla. ex rel. Oklahoma Tax Comm'n v. Graham*, 822 F.2d 951 (10th Cir. 1987).

2 The Court recognized, "It is true that respondents, bargaining unit members at the time of the plant closing, possessed substantial rights under the collective agreement, and could have brought suit under § 301. As masters of the complaint, however, they chose not to do so." *Caterpillar*, 107 S. Ct. at 2431.

Id. at 2429 (footnotes and citations omitted). Because the *Caterpillar* complaint on its face was grounded on state law, raised no federal issues, and no other basis for federal jurisdiction was present when the suit was filed, the Court concluded removal was improper.

In our case, the State's complaint facially states a claim grounded on state law. Indeed, nothing within the *literal* language of the pleading even suggests implication of a federal question. Yet, such a question is inherent within the complaint because of the parties subject to the action.

The named defendant is the Chickasaw Nation, a sovereign entity whose status is subject to and limited by congressional power alone. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Thus, as we noted in our prior opinion, absent its consent, the Chickasaw Nation is subject to suit only under conditions prescribed by Congress. *State of Okla. ex rel. Oklahoma Tax Comm's v. Graham*, 822 F.2d 951, 956 (10th Cir. 1987).

The State attempted to "well-plead" its complaint by invoking only state revenue laws and thereby avoid the Chickasaw Nation's sovereign status. However, the complaint is not well-pleaded and consequently falls outside the boundaries *Caterpillarr* set.

In order to well-plead an action in state court to impose state tax liability upon certain tribal commercial affairs transacted on the territory of the Chickasaw Nation, the State must plead either the tribe's consent to suit or its valid waiver. *See Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977). The State alleges neither, and the absence of this essential element of subject matter jurisdiction is the essence of the federal question inherent in the State's action.

On remand, we asked the parties to address the applicability of *Department of Revenue of Iowa v. Investment Finance Management Co.*, 831 F.2d 790 (8th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3734 (U.S. Apr. 25, 1988) (No.87-1480). In that case, the Eighth Circuit dealt with a removal predicated upn federal preemption. The State argues *Investment Finance* is inapplicable because "the subject of [the instant] lawsuit does not come within the exclusive province of

the Federal Government," and "the State of Oklahoma has jurisdiction over the parties and the subject matter." These arguments miss the point of concern.

The pertinent issue from *Investment Finance* is whether a removed action unenforceable against an Indian tribe or its agent should be remanded or dismissed. The Eighth Circuit held that remand is proper, but *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377 (1922), upon which *Investment Finance* is based, portends a different result.

Based on the rules of removal jurisdiction in force at the time the complaint was filed in state court, the Eighth Circuit decided the federal court to which the action was removed acquired only the jurisdiction of the state court. Thus, if the state court lacked jurisdiction over a case because of federal preemption, the federal court also lacked jurisdiction.[3] The predicate for this holding was established by Justice Brandeis in *Lambert Run* when he held "[i]f the state court lacks jurisdiction, . . . the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." *Lambert Run*, 258 U.S. at 382. Yet, contrary to the conclusion reached in *Investment Finance*, the *Lambert Run* court held the district court must dismiss the case without prejudice when it perceives the state court lacked subject matter jurisdiction. We conclude that is the proper disposition of this matter as well. Because we believe sovereign immunity protects the Chickasaw Nation against the State's action, we would follow the *Lambert Run* analysis to its final conclusion. Accordingly, the judgment of the District Court of the Eastern District of Oklahoma dismissing this action is **AFFIRMED.**

No. 86-1655, State of Oklahoma ex rel. Oklahoma Tax Commission v. Jan Graham and Chickasaw Nation

TACHA, Circuit Judge, dissenting.

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3 Although this derivative jurisdiction rule was abolished by 28 U.S.C. § 1441 (1986), the Eighth Circuit held the amendment inapplicable to the case.

Again I must respectfully dissent. The decision of the Supreme Court in *Caterpillar Inc. v. Williams*, 107 S. Ct. 2425 (1987), reinforces the view expressed in my previous dissent, 822 F.2d 951, 957-60 (1987).

In *Caterpillar*, the Supreme Court makes clear that complete preemption does not provide a basis for removal from state to federal court unless the plaintiff's claims fall within the scope of the preempted field. In *Caterpillar*, the preemption question involved § 301 of the Labor Management Relations Act. It is well established that § 301completely preempts the field of private rights arising out of collective bargaining agreements, so as to provide a basis for removal of cases purportedly relying on state law but in fact stating claims under collective bargaining agreements. *Caterpillar*, 107 S. Ct. at 2430; *Avco Corp. v. Aero Lodge No. 735, Int'l Assn. of Machinists*, 390 U.S. 557, 559-60 (1968); *see also Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 23-24 (1983). In *Caterpillar*, the Court decided that plaintiffs' claims for breach of individual employment contracts were not within the scope of the field preempted by § 301 and therefore the defendants could not remove the action to federal court.

In particular, the final argument raised by the defendants in *Caterpillar* to justify removal is precisely analogous to the argument for removal in the present case. This argument was rejected by the Supreme Court, and it should be rejected here also. In *Caterpillar*, the defendant argued that § 301 preempts a state claim even when the defendant raises only a defense based on a collective bargaining agreement. The defendant reasoned that, because interpretation of the agreement involves an area of federal law which preempts state law, if the defendant's interpretation is valid, the state claims do not survive and removal is appropriate. That is exactly the situation presented to this court. The defendant has asserted the defense of sovereign immunity. It is undisputed that federal law completely preempts this field. Thus, to apply this defense, a court must necessarily look to federal law. However, the interjection of such a defense does not provide a basis for removal jurisdiction. As the Supreme Court stated in *Caterpillar*:

> It is true that when a defense to a state claim is

> based on the terms of a collective-bargaining agreement [sovereign immunity in the pressent case], the state court will have to interpret that agreement [federal law regarding sovereign immunity] to decide whether the state claim survives. But the presence of a federal question, even a § 301 question [question of sovereign immunity], in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint . . . .

107 S. Ct. at 2433.

The majority opinion does not persuade me that sovereign immunity operates other than as a defense. The majority relies on *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977), and, in its previous opinion, relied on *Ramey Constr. Co. V. Apache Tribe*, 673 F.2d 315 (10th Cir. 1982), for the proposition that a plaintiff must affirmatively plead either consent or waiver of sovereign immunity to state a cause of action against an Indian tribe. The majority seems to be confusing a requirement for prevailing on the merits with a requirement for stating a cause of action. While the cases the majority relies on make clear that the plaintiff has the burden of demonstrating consent or waiver when the defense of sovereign immunity is raised, they contain no suggestion that allegations regarding consent or waiver constitute part of the cause of action and must appear in the plaintiff's complaint.

Furthermore, in analogous situations where the defendant claims immunity and the complaint does not present a federal question, it is a federal statute that provides authority for the federal courts to take jurisdiction. *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 n.20 (1983) (28 U.S.C. §1330 makes an exception to sovereign immunity part of the plaintiff's cause of action against a foreign sovereign); *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969) (28 U.S.C. § 1442 allows removal of actions brought in state court against federal officials acting in their official capacity). No such statute covers the present situation.

The majority notes that "the Chickasaw nation is subject to suit only under conditions prescribed by Congress," and suggests that this necessary reliance on federal authority allows removal to federal court. Majority opinion at 3-4. The Supreme Court addressed and rejected precisely this argument in *Gully v. First Nat's Bank*, 299 U.S. 109 (1936). In *Gully*, the state of Mississippi filed suit in state court to collect state taxes from a national bank. The district court allowed removal because the state must rely on a federal statute for the power to tax a national bank. In its opinion, the Supreme Court stated:

> Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. The tax here in controversy if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it. True, the tax, though assessed through the action of the state, must be consistent with the federal statute consenting, subject to restrictions, that such assessments may be made. It must also be consistent with the Constitution of the United States. If there were no federal law permitting the taxation of shares in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense. That there *is* a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid.

Id. at 115 (emphasis original) (citations omitted).

After reconsidering the present case in light of the Supreme Court's decision in *Caterpillar*, I am firmly convinced that this action was improperly removed to federal court. I would remand the case to state court. Because I would remand the case, I express no opinion on the applicability of *Department of Revenue of Iowa v. Investment Finance Management Co.*, 831 F.2d 790 (8th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3734 (U.S. Apr. 25, 1988) (No. 87-1480).

APPENDIX B

SUPREME COURT OF THE UNITED STATES

NO. 87-635

OKLAHOMA TAX COMMISSION

Petitioner

v.

JAN GRAHAM, *et al.*

ORDER

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Caterpillar Inc. v. Williams*, 482 U.S. ___ (1987).

APPENDIX C

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION,	)	
Plaintiff-Appellant,	)	
v.	)	No. 86-1655
JAN GRAHAM AND CHICKASAW NATION, by and through OVERTON JAMES, Governor of the Chickasaw Nation,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
For the Eastern District of Oklahoma
D.c. No. 85-663-C

Robert C. Jenkins (J. Lawrence Blankenship with him on the briefs), Oklahoma City, Oklahoma, For Appellant.

Bob Rabon of Kile and Rabon, Hugo, Oklahoma, for Appellees.

Before SEYMOUR, MOORE, and TACHA, Circuit Judges.

MOORE, Circuit Judge.

The State of Oklahoma ex rel. Oklahoma Tax Commission (State or appellant) appeals the district court's denial of its motion to remand and subsequent granting of the motion to dismiss filed by defendants Jan Graham and the Chickasaw Nation (Chickasaw Nation collectively or the Tribe). In its first order, the United States District Court for the Eastern District of Oklahoma held that removal was proper because the Constitution vests the Federal Government with exclusive authority over Indian tribes which is not limited or prohibited by 28 U.S.C. § 1343, the Tax Injunction Act. The district court, in a second order, then dismissed the State's action on the basis of the Chickasaw Natin's sovereign immunity from unconsented suit. The State now urges removal was improper because the action was based on state law alone as revealed plainly on the face of its complaint. alternatively, if removal is affirmed, the State argues that sovereign immunity cannot bar a state's legitimate power to levy and collect taxes. We disagree with both contentions and affirm the orders of the district court.

I

The Chickasaw Nation, one of the Five Civilized Tribes early removed to Indian Territory, is federally recognized Indian tribe which ownsd and operates the Chickasaw Motor Inn (the motel) in Sulfur, Oklahoma. The motel was purchased by the Chickasaw Nation as part of a tribal economic development project.. The tribal legislature authorized the operation of a tobcco shop and bingo game at the motel. Jan Graham, an employee of the Chickasaw Nation, manages the motel, the tobacco shop, and the game.

The State filed its complaint in the District Court of Murray County, Oklahoma, alleging that large quantities of cigarettes not bearing state excise and tax stamps were sold at retail to the general public from the motel. The absence of these tax stamps as well as the Chickasaw Nation's failure to file reports of its sales allegeably violated 68 Okla. Stat. §§ 306, 312, 316, 1354, 1361, and 1362. The State surther alleged that State sales taxes had not been paid on gross receipts from the operation of the bingo game at the motel, and the required reports had not been filed. The State sought an order permanently enjoining and restraining the Chickasaw Nation from conducting these activities and all business at the motel until all taxes, penalties, and interest were paid in full. The state court immediately

granted a temporary restraining order to enjoin the Chickasaw Nation from selling unstamped cigarettes and operating the bingo games.

Subsequently, the Chickasaw Nation removed the action to the United States District Court for the Eastern District of Oklahoma. The State moved to remand the action. Citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), and *Moe v. Confederated Salish & Kootenia Tribes of Flathead Reservation*, 425 U.S. 463 (1976), the district court denied the State's motion. The Chickasaw Nation then moved to dismiss the action pursuant to Fed. R. Civ.P. 12(b) for lack of subject matter jurisdiction. Granting the Tribes's motion, the district court noted that although neither this court nor the United States Supreme Court had laid a clear precedent for the determination of whether the Tribe's sovereign immunity from unconsented suits barred the present action, federal case law, particularly *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *Chemehuevi Indian Tribe v. Claifornia State Bd. of Equalization*, 757 F.2d 1047 (9th Cir.), *rev'd in part on other grounds*, 474 U.S. 9 (1985), dictated that the doctrine of sovereign immunity bars suit against the Tribe.

We agree with the conclusion reached by the trial court, but we emphasize the issues are subject of two separate inquiries. First, we must determine whether removal jurisdiction was present. Second, if removal is proper, we must determine whether substantive jurisdiction exists.

II.

A.

The State urges us to scrutinize the face of its complaint and hold that no federal question is present to permit removal. Bisecting this argument, the State contends, first, that the action involves solely the interpretation of state tax and revenue laws and, second, that removal is prohibited by 28 U.S.C. § 1341, the Tax Injunction Act.

We are unswayed by either assertion, mindful instead that our inquiry into whether a federal court has removal jurisdiction and whether it may exercise its limited substantive jurisdiction is not perforce bounded by the face of a complaint. Indeed, when the state plaintiff couches his "necessarily federal cause of action solely in

state law terms . . . the federal removal court will look beyond the letter of the complaint to the substance of the claim in order to assert jurisdiction." 14A Wright, Miller & Cooper, *Federal Practice & Procedure* § 3722, at 243 (1985).

The substance of the State's claim embraces the central jurisdictional issue we must decide in this appeal. Indeed, when we strip the State's complaint of its statutory baggage, we are left with an action in which the State is attempting to enforce an essential element of its sovereignty, the power to tax, over an Indian tribe.

This recognition underscores the implicit federal question lodged in the State's complaint and focuses our inquiry. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Superior Oil Co. v. United States*, 798 F.2d 1324, 1328 (10th Cir. 1986)." "The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 2402 (citations omitted). *See also Williams v. Lee*, 358 U.S. 217, 220 (1959). The corollary of this principle is clear. "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165, 172 (1977). Moreover, it must "*affirmatively appear []* that there has been a congressional or tribal waiver of immunity." *Ramey Constr. Co. v. Apache Tribe*, 673 F.2d 315, 318 (10th Cir. 1982) (emphasis added); *see also Weeks Constr., Inc. v. Oglala Sioux Housing Auth.*, 797 F. 2d 668 (8th Cir. 1986). Thus, an alleged waiver or consent to suit is a necessary element of the *well-pleaded* complaint. *See also North Davis Bank v. First Nat's Bank of Layton*, 457 F.2d 820, 822 (10th Cir. 1972) (action necessarily presented threshold question of federal law); *Madsen v. Prudential Federal Savings & Loan Ass's*, 635 F.2d 797, 801 (10th Cir. 1980), *cert. denied*, 451 U.S. 1018 (1981) (distinguishing *North Davis Bank*). Thus, removal jurisdiction as to our first inquiry was correctly asserted.

Furthermore, the State can direct us to no contrary precedent or principle to require remanding this action to the state court. The

State's citations to authority are limited and distinguishable. [1] In fact, appellant is unable to provide us with any authority in which a state, absent a tribe's valid waiver or consent to suit, has succeeded in retaining state court jurisdiction in circumstances similar to our case.

Nevertheless, during oral argument, the State refocused its arguments and cited *Francise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1 (1983), for the proposition that a federal defense will not deprive a state court of jurisdiction. Appellant contends *Franchise Tax* prohibits our going beyond the face of the complaint to fashion its cause of action to the Tribe's federal defense.

In *Franchise Tax*, the Court addressed the issue of whether a state's suit to collect state taxes against a welfare benefit trust is removable to a federal district court because of ERISA preemption of a state's power to levy on trust funds. The Supreme Court held that a suit filed by state tax authorities to enforce state levies against funds held in an ERISA employee benefit plan is neither a creature of ERISA nor a suit of which the federal courts would take jurisdiction because of a question of federal law. *Id.* at 28. The Court applied the well-pleaded complaint rule to circumscribe the presence of federal question jurisdiction in plaintiff's complaint and found that the ERISA defense did not completely preempt the state cause of action. Appellant urges the same analysis is appropriate here.

Franchise Tax Board does not defeat federal removal jurisdiction in this case because the defendants are asserting the absence of jurisdiction and not federal preemption. Tribal sovereign immunity is

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1 The State cites State of Okla. ex rel. David Moss, Dist. Attorney v. Muskogee (Creek) Nation, Nos. 86-1832, 86-1887 (N.D. Okla. filed June 4, 1986, cross appeal filed June 13, 1986). The specific issue in that appeal is whether the state may enforce its nuisance law to prohibit the operation of the tribe's bingo game. Finally, appellant cites Wisconsin Winnebago Indian Tribe, 603 F. Supp. 428 (W.D. Wis. 1985) (state civil forfeiture action to enforce state criminal statute is not removable). During oral argument, the State stressed that our decision in Crow v. Wyoming Timber Products Co., 424 F.2d 93 (10th Cir. 1970), resolves the removal issue. Crow addresses the derivative nature of removal jurisdiction and is helpful although not entirely dispositive of this appeal.

jurisdictional, *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982), and, as we shall discuss later, places a different spin upon our inquiry. At this juncture, however, we find that removal was proper because of the constitutional grant of federal jurisdictin over Indian affairs. 28 U.S.C. § 1331.

B.

This inital holding recognizes that when removal was effected automatically in this case, the federal district court instantly acquired the threshold jurisdiction to decide whether it had the power to exercise jurisdiction over the action., This "jurisdiction to determine jurisdiction": is an essential power, subject ot review of any court, particularly the federal courts of limited jurisdiction. *Land v. Dollar*, 330 U.D. 731, 739 (1947); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940). For this reason, upon removal, the federal district court acquired the same threshold jurisdiction that was vested in the state court as well. This jurisdiction to determine jurisdiction is not defeated by a subsequent determination that a court does not have subject matter jurisdiction over the issures in controversy.[2]

C.

The State's second argument to defeat removal jurisdiction ignores established precedent. The Tax Injunction Act, 28 U.S.C. § 1341, does not mandate state court jurisdiction. *Moe v. Confederated Salish & Kootenia Tribes*, 425 U.S. at 463, laid this issue to rest upon analyzing the origin of § 1341 and its long-accepted applicability to the United States. *Moe* settled that "[s]ince the United States is not barred by § 1341 from seeking to enjoin the enforcement of a state tax law, . . . The Tribe is not barred from doing so here." Id. at 474 (citation omitted). Section 1341 does not prohibit the Chickasaw Nation's removal of this action.

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2 This concept unites our threshold jurisdiction inquiry with the derivative nature of removal jurisdiction. *Minnesota v. United States*, 305 U.S. 382 (1939), *Goodrich v. Burlington Northern R.R.*, 701 F.2d 129, 130 (10th Cir. 1983).

III.

Having concluded removal was proper, we turn to the State's contention that the district court erred in dismissing the suit against the Tribe and Jan Graham, individually, on the basis of tribal sovereign immunity. Support for this argument is difficult to discern because the State relies on precedent in which the issue of sovereign immunity was not reaised[3] and because the State interweaves the merits of the action with the legal issue of dismissal. Nevertheless, the principles governing the resolution of this question are not new. On the contrary. "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 168 (1973) *(citing Rice v. Olson*, 324 U.S. 786, 789 (1945).

The Court has consistently recognized that "Indian tribes retain attributes of sovereignty over both their members and their territory." *California v. Cabazon Band of Mission Indians*, ____U.S. ____, 107 S. Ct. 1083, 1087 (1987). This tribal sovereignty is historically recognized to have a unique and limited character. "It exists only at the sufferance of Congress." *United States v. Wheller*, 435 U.S.313, 323 (1978); serves to promote Indian self-government and economic self-sufficiency, *White Mountain Apache Tribe v. Bracher*, 448 U.S. 136 (1980); and represents an accomodation between valid though competing Indian and state interests, *Rice v. Rehner*, 463 U.S. 713, 719 (1983). Although the sovereign immunity enjoyed by tribes is not absolute, we may infer state authority only "where Congress has expressly provided that state laws shall apply." *McClanahan*, 411 U.S. at 171.

Hence, tribal sovereign immunity prohibits suit against Indian nations without Congressional authorization. This sovereign

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3 For example, the State cites *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (tribe brought protest of New Mexico use tax); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (actions were brought by the United States on behalf of the tribes); *Rice v. Rehner*, 463 U.S. 713 (1983) (federally licensed Indian trader sought declaratory judgment against state alcoholic beverage control board.

bingo games until payment of the amounts allegedly due. The suit would in immunity enjoyed by a tribe is "as though the immunity which was theirs as sovereigns passed to the United States for their benefit." *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940). Thus, before *any* court can acquire jurisdiction over a tribe, it must affirmatively appear that "there has been a congressional or tribal waiver of immunity." *Ramey Constru. Co. v. Apache Tribe*, 673 F.2d at 318. "The judicial doctrine of tirbal sovereign immunity has long protected Indian tribes from suit in state and federal courts." *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984); *see also Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983).

There is no indication in the record on the motion to dismiss that an unequivocal waiver, *Santa Clara Pueble v. Martinez*, 436 U.S. at 58, or consent to suit was offered to permit the State to litigate this action. *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1052 (9th Cir. 1985), *rev'd in part*, 474 U.S. 9 (1985). (Like the United States, and Indian tribe can consent to suit, but 'such consent must be unequivocally indicated.' " (citations omitted). Moreover, we are directed to no authority, absent these conditions, to authorize the suit.[4] Instead, at this stage, resolution must be guided by the established tradition of that sovereign immunity inherent in the distinct status of the Chickasaw Nation. *Santa Clara Pueble v. Martinez*, 436 U.S. at 49; *Puyallup Tribe*, 433 U.S. at 165. Thus, the district court correctly dismissed the action as to the Chickasaw Nation.

The conclusion that the Tribe is immune from suit does not end our inquiry, however. The state contends that even if the suit against the Tribe is barred, tribal employee Jan Graham is still subject to suit under the doctrine announced in Tenneco Oil Co. V. Sac & Fox Tribe, 725 F.2d 572, 574 (10th Cir. 1984). We disagree.

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4 After the district court granted the motion to dismiss, the State sought reconsideration on the ground that in Chemehuevi was later reversed. In *Chemehuevi*, the Ninth Circuit affirmed the district court's dismissal of the state's counterclaim for back taxes against the Chemehuevi tribe. The Supreme Court reversed on other grounds, and the dismissal of the counterclaim was not disturbed by the Ninth Circuit when the case was remanded. *Chemehuevi*, 800 F.2d 1446 (9th Cir. 1986).

Tribunal officials "do not have the same immunity as the Tribe itself." *Kennerly*, 721 F.2d at 1259 (citing *Martinez*, 436 U.S. at 59). But tribal immunity " extends to tribal officials when acting in their official capacity and within the scope of their authority." *United States v. Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1981). The state cannot avoid the doctrine of sovereign immunity by nominally suing a tribal officer when the suit in substance is against the sovereign. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-88 (1949). The State does not contend that Graham was not acting in an official capacity or without authorization by the Tribe.

Nevertheless, in *Tenneco Oil* we recognized that "[w]hen the complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked." 725 F.2d 574, 576 (McKay J., concurring). The concurrence in *Tenneco Oil* noted that "[w]ere it not for such an allegation in this case, the sovereign immunity of the tribe would extend to its officers." *Id.* We thus must examine the State's petition and complaint to determine whether employee Graham is immune from suit.

Nowhere in the State's petition is there an allegation that defendant Graham acted outside of the amount of authority that the Tribe is capable of bestowing as a matter of federal or constitutional law. It is well-established that only the Federal Government can limit the scope of tribal sovereignty. The petition only alleges that defendants failed to comply with state law. Thus, the *Tenneco Oil* exception does not apply.

Additionally, the relief sought by the State would operate directly against the Tribe and thus the suit in substance is against it rather than Graham. "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interface with the public adminsitration, . . . or if the effect of the judgment would be 'to restrain the Government from acting, or compel it to act.' "*Dugan v. Rank*, 372 U.S. 609, 620 (1963) (Citations omitted). The State seeks an accounting for "taxes, penalties, and interest" allegedly due, and seeks to enjoin the operation of the Chickasaw Nation's motel, cigarette sales, and

effect grant relief against the sovereign itself, "over which the court, in the absence of consent, has no jurisdiction." *Larson*, 337 U.S. at 688. Thus, the suit as to Graham is also barred. *Id.*

The judgment of the district court dismissing the suit is AFFIRMED.

No. 86-1655, State of Oklahoma ex rel. Oklahoma Tax Commission v. Jan Graham and Chickasaw Nation

TACHA, Circuit Judge, dissenting.

I respectfully dissent. This is not a case about the sovereign immunity of an Indian tribe. This is a case about *who decides* the sovereign immunity of an Indian tribe. In my opinion the majority has incorrectly concluded that a claim of sovereign immunity satisfies the removal jurisdiction requirements that a federal question appear in the plaintiff's well-pleaded complaint. I would find that the federal courts do not have jurisdiction and that this case should not have been removed from state court.

I.

In *Franchise Tax Board v. Construction Laborer's Vacation Trust*, 463 U.S. 1 (1983), the Supreme Court held that a suit filed in state court can be removed to federal court only if the suit could have been filed originally in federal court. "If it appears before final judgment that a case was not properly removed, because it was not within the original jurisdiction of the United States district courts, the district court must remand it to the state court from which it was removed." *Id.* at 8. Thus, we must decide whether the federal courts would have original jurisdiction over the state's tax suit against the tribe.

Federal question jurisdiction exists only if the plaintiff's well-pleaded complaint establishes that the case arises under federal law. *Id.* at 9-10; *see also Metropolitan Life Ins. Co. v. Taylor*, 107 S. Ct. 1542, 1546 (1987). It is "settled law that a case may not be removed to federal court on the basis of a federal defense". *Franchise Tax Bd.*, 463 U.S. at 14. The *Franchise Tax Board* Court recognized that:

> The [well-pleaded complaint] rule . . . may produce awkward results, especially in cases in which neither the obligation created by state law nor the defendant's factual failure to comply are in dispute, and both parties admit that the only question for decision is raised by a federal . . . defense. Nevertheless, it has been correctly understood to apply in such situtations.

Id. at 12 (footnote omitted)

It is not disputed that the face of the state's complaint in this case raises only state tax questions. The majority, however, finds that the state's attempt "to enforce an essential element of its sovereignty, the power to tax, over an Indian tribe . . . underscores the implicit federal question lodged in the state's complaint. "Maj. op at 5.I disagree. This is not a case in which the plaintiff has couched a "necessarily federal cause of action solely in state law terms." 14A C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procdures* § 3722 (1985). There are no questions of federal law in the state's well-pleaded complaint.

"The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes," *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985). Indeed, the Supreme Court has adopted a *per se* rule precluding state taxation of Indian tribes and tribal members. *See California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083, 1091 n.17 (1987). Congress, however, can authroize a state to tax an Indian tribe if the congressional intention to do so is unmistakenably clear. *Montana*, 471 U.S. at 765. Thus, the tribe argues that because it is necessary for the state to rely upon a grant of congressional authority to tax the tribe, the state has raised a federal question in its complaint.

Gully v. First Nat'l Bank, 229 U.S. 109 (1936), instructs otherwise. In *Gully*, the State of Mississippi filed suit in state court to collect state taxes from a national bank. The lower courts granted the bank's petition to remove the action to federal court because "the power to lay a tax upon the shares of national banks has its origin and measure in the provisions of a federal statute, and that by

necessary implication a plaintiff counts upon the statute in suing for the tax." *Id.* at 112 (citation omitted). The Supereme Court held that removal was improper. Justice Cardozo wrote:

> Not every question of federal law emerging in the suit is proof that a federal law is the basis of the suit. The tax here in controversy if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it. True, the tax, though assessed through the action of the state, must be consistent with the federal statute consenting, subject to restrictions, that such assessments may be made. It must also be consistent with the Constitution of the United States. If there were no federal law permitting the taxation of shares in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense. That there *is* a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid.

Id. at 115 (emphasis original) (citations omitted)

Gully establishes that although a state must rely upon federal authorization to tax a particular institution, a suit to collect such taxes does not necessarily raise a federal question in the well-pleaded complaint. The majority attempts to distinguish that state tax action in this case from *Gully* by arguing that a waiver of tribal immunity is part of a well-pleaded complaint. Maj. op. at 5-6. The case relied upon by the majority, *Ramey Construction Co., Inc. v. Apache Tribe of Mescalero*, 673 F.2d 315 (10th Cir. 1982), involved an action brought against an Indian tribe in *federal* court.[1]

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[1] *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986), another case cited by the majority, actually undermines the position that the presence of an Indian tribe as a defendant creates a federal question. In *Weeks*, a tribal housing authority was sued in federal court. The Eight Circuit held there was no federal question jurisdiction:

> [T]he fact that the Housing Authority is created by and operates on behalf of an Indian tribe is not alone sufficient to find the existence of a federal question. *See Martinez v. Southern Ute Tribe*, 249 F.2d 915, 917 (10th Cir. 1957), *cert. denied*, 356 U.S. 960, 78 S.Ct. 998, 2 L.Ed.2d 1067 (1958) (federal question jurisdiction does not exist merely because an Indian is a party or because the suit involves Indian property or contracts). Rather, the rights which *Weeks* seeks to enforce are based on its construction contract with the Housing Authority, interpretation of which is go-verned by local, not federal, law _ Because *Weeks* breach of contract claim does not require inter-pretation of the validity, construction or effect of federal law, no subject matter jurisidiction over the Housing Authority based on a federal question exists here.

Weeks, 797 F.2d at 672 (footnote omitted). Similarly, the state of Oklahoma's state tax claim does not require a determination of federal law.

There was no question of removal jurisdiction in *Ramey*. Instead, the only question was the sovereign immunity of the tribe. It is true that the tribe is immune from suit in any court unless it has waived its immunity. Such a waiver must be express and clear; it cannot be implied. *See, e.g., Jicarilla Apache Tribe v. Hodel*, No. 85-1712, slip op. at 6 (10th Cir. June 18, 1987). It is doubtful that "a tribe can waive its immunity to suit in a state or federal court without congressional authority." F. Cohen, *Handbook of Federal Indian Law* 325 (1982 ed.) But *Gully* makes clear that the need for federal authority to sue a party does not raise a federal question for the purposes of a well-pleaded complaint.

Ramey also acknowledged that "[t]he Indian tribes' sovereign immunity is co-extensive with that of the United States." 673 F.2d at 319-20. The determination of federal question removal jurisdiction thus should be the same in cases involving Indian tries and in cases involving the United States. While federal officials are allowed to remove all suits brought against them to federal court, the basis of removal in those instances is a separate statute rather than a pervasive

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[1] (continued from A-20)

federal question. 28 U.S.C. § 1442 allows for the removal of actions brought in state court against federal officials acting in their official capacity. The right to remove a case from state court in that instance is absolute; removal takes place even if the action could not have been brought originally in federal court. *Willingham v. Morgan*, 395 U.S. 402, 406 (1969). The Congress found it necessary to enact a special removal statute authorizing federal court jurisdiction in all cases involving federal officials acting in their official capacitites implies that the *status* of a federal official is not in itself sufficient to create federal jurisdiction. *See also* 12 U.S.C. § 1819 (the Federal Deposit Insurance Corp. can remove suits brought against it in state court except in specified situations where the FDIC is the receiver of a state bank). There is no such statute conferring federal jurisdiciton in all cases in which an Indian tribe is a party.

Suits against foreign sovereigns are treated similarly to suits against federal officials. In *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), a Dutch corporation sued a Nigerian state bank in federal court for breach of contract. The bank moved to dismiss, arguing that the court lacked jurisidciton because of the state bank's sovereign status. The Court held that the Foreign Sovereign Immunities Act, 28 U.S.C. 6 1330, expressly provided for suits against foreign sovereigns in federal court. *Id.* at 489-91. The Court also observed:

> Prior to passage of the Foreign Sovereign Immunities Act, which Congress clearly intended to govern all actions against foreign sovereigns, state courts on occasion had exercised jurisdiction over suits between foreign plaintiffs and foreign sovereigns . . . Congress did not prohibit such actions when it enacted the Foreign Sovereign Immunities Act, but sought to ensure that any action that might be brought against a foreign sovereign in state court could also be brought in or removed to federal court.

Id. at 491 n. 16 (citations omitted). Congress has not enacted an equivalent provision that would allow the removal of actions brought aginst an Indian tribe in state court.

II.

Tribal sovereign immunity is jurisdictional. *Raney*, 673 F.2d at 318; *see also* Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058 (1982) ("The judicial doctrine of tribal sovereign immunity traditionally has protected Indian tribes from suit in state and federal courts." (footnotes omitted). The question here is *which court* decides the question of sovereign immunity. *Either* the state court or the federal court must have jurisdiction to decide whether sovereign immunity applies in this case. *See, e.g., Land v. Dollar*, 330 U.S. 731, 739 (1947) (a court has jurisdiction to determine if it has jurisdiction). As the majority properly recognizes, the federal district court did not acquire the threshold jurisdiciton to determine the sovereign immunity of the Chickasaw nation until the court found that removal from state court was proper. Maj. op. at 4, 8. For the reasons I have described, I conclude that removal was improper in this case. Therefore, I would not reach the question of the sovereign immunity of the tribe.

The implication of the majority's position is that federal court removal jurisidiction exists whenever "the defendants are asserting the absence of jurisidiciton." Maj. op. at 7. A challenge to state court jurisdiciton cannot be sufficient to invoke removal jurisdiciton. A federal court obtains removal jurisdiction only when it would have original jurisdiction. Federal law may well determine the result in a state court case, but showing that a federal question very likely will be dispositive of a case falls short of a showing that the plaintiff's original cause of action arises under federal law.

III.

This court must afford "proper respect for the ability of state courts to resolve federal questions presented in state court litigation." *Pennzoil Co. v. Texaco, Inc.* 107 S.Ct. 1519, 1527 (1987). The state court is constitutionally obligated to follow the commands of federal law regarding Indian tribal sovereignty. Should the state court fail to do so, the Supreme Court can review that decision on appeal. *See Franchise Tax Bd.*, 463 U.S. at 12 n.12.

Because the State of Oklahoma's complaint in this case does not raise a federal question, there would be no original jurisdiction in the federal courts, and thus there is no removal jurisdiciton. I would hold that this action was improperly removed to federal court and that it should now be remanded to state court.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex. rel., OKLAHOMA TAX COMMISSION Plaintiff, v. JAN GRAHAM and CHICKASAW NATION, Defendants.	)	No. 85-663-C

ORDER

Now before the Court for its consideration is the motion of the plaintiff, Oklahoma Tax Commission, to remand the above styled and numbered case which was removed by defendants from the District Court of Murray County, Oklahoma on October 22, 1985.

Defendants removed the action asserting federal question jurisdiction under 28 U.S.C. § 1331. In its motion to remand plaintiff asserts, first, that the Court lacks subject matter jurisdiction since on the face of the petition only state statutory violations are raised; and second, that removal is prohibited under 28 U.S.C. § 1341, the Tax Injunction Act.

In *Montana v. Blackfeet Tribe of Indians*, 105 S.Ct. 2399 (1985) the court stated:

> The constitution vests the Federal Government with exclusive authority over relations with Indian tribes. (citations omitted). As a corollary of this authority, and in recognition of the sovereignty retained by Indian Tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory (citations omitted). *Blackfeet Tribe*, 105 S.Ct. at 2402.

It is apparent from reading the petition that the State of Oklahoma is attempting to enforce its revenue statutes against certain activities of a federally recognized Indian Tribe, the Chickasaw nation. This Court clearly has subject matter jurisdiciton over the controversy raised by the pleadings.

In *Moe v. Salish & Kootenai Tribe*, 425 U.S. 463 (1976), the court clearly stated 28 U.S.C. § 1341 does not bar federal courts from assuming original jurisdiction over civil actions involving Indian Tribes and a State seeking enforcement of its tax and revenue laws.

WHEREFORE, premises considered, it is the Order of the Court that the motion of the plaintiff, State of Oklahoma, ex rel. the Oklahoma Tax Commission, to remand to state court is denied.

IT IS SO ORDERED this 27th day of February, 1986.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex. rel., OKLAHOMA TAX COMMISSION Plaintiff, v. JAN GRAHAM and CHICKASAW NATION, Defendants.	)	No. 85-663-C

ORDER

Now before the Court for its consideration is the motion of the defendants, Jan Graham and Chickasaw Nation, to dismiss the action for the reason that the defendants are immune from unconsented litigation.

The defendant Chickasaw Nation owns the Chickasaw Motor Inn in Sulfur, Oklahoma. The motel is situated on trust lands, the title being vested in the United States in trust for the Tribe. The Chickasaw nation has a tobacco shop and conducts a small bingo game at the motel. The motel is managed by a tribal employee, the defendant Jan Graham. The Oklahoma Tax Commission brought this action against the Tribe and defendant Grham. The Tax Commission seeks to collect the tax on the revenues derived from operation of the motel, the sale of tobacco, and the bingo games; or enjoin the Tribe from continued operation of these activities.

In their motion to dismiss, defendants assert that an Indian tribe such as the Chickasaw Nation enjoys sovereign immunity from unconsented suit and this immunity extends to its officials and agents acting within the scope of tribal affairs. The Tribe cites *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), in stating " the sovereign immunity of Indian Tribes is similar to the sovereign immunity of the United States neither can be sued without the consent of Congress." *supra* at 58.

In response, the plaintiff asserts that tribal sovereignty is limited in scope to matters wholly within tribal powers, and has no application in an action to enforce state tax laws. Plaintiff concedes that the tribe is immune from suit regarding any activity involving internal tribal self-government. However, the plaintiff contends that the immunity doctrine has no application to tribal conduct involving matters outside the Tribe's sovereign powers, e.g., the tribe's relationship or obligation to the state. Plaintiff thereafter cites authority on the merits of its lawsuit. At this stage of the litigation the Court is not reviewing the merits as to whether the State of Oklahoma may enforce its revenue laws against the Chickasaw Nation; but rather, the Court's scope of review under defendants' motion to dismiss is whether the parties are properly before the Court or whether the action is barred by the doctrine of tribal sovereign immunity. Therefore, plaintiff's recitation of authority on the merits of its action shall not be presently considered.

The Court is mindful that the Tenth Circuit and the united States Supreme Court has not laid clear precedent for this Court to follow in determination of this issue. Both parties have quoted selected portions of case law from various jurisdicitons in an effort to promote their respective positions.

In *State of Oklahoma v. Senaca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985), our state supreme court has clearly taken the position that tribal sovereign immunity does not act as a bar to state's suits against Indian tribes. The court applied a balancing test and weighed the issue in favor of state action. Albeit, the Oklahoma Supreme Court's analysis is interesting, this Court under federal jurisdiction must view the issue independently and apply the rules of law espoused by the United States Supreme Court or the Tenth Circuit.

In the absence of clear controlling precedent, a review of other federal circuit court's decisions on the issue is persuasive authority.

In *White v. Pueblo of San Juan*, 728 F.2d 1307 (10th Cir. 1984), the court held that the doctrine of tribal sovereign immunity precludes federal court jurisdiction over a claim for damages under the Indian Civil Rights Act by a non-Indian against an Indian Tribe. The Tenth Circuit applied *United States v. United Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), as the "long-standing rule that absent congressional authorization Indian tribes are exempt from suit under the doctrine of sovereign immunity." *White v. Pueblo*, *supra* at 1311.

In *Tenneco Oil v. Sac & Fox*, 725 F.2d 572 (10th Cir. 1984), the court acknowledged tribal immunity from unconsented suit, but held that tribal officials were not immune when the validity of a tribal ordinance as it applies to non-Indians (in this instance an oil company) is in question. The court held it had jurisdiciton to determine whether the tribal ordinances which had the effect of cancelling oil company's oil and gas leases were valid under federal law and applicable treaties. In the case currently before the Court, the issue raised is not whether a tribal ordinance is impermissibly being applied against and effecting non-Indians; but rather, the issue is whether a state statute can properly be applied against the Tribe when suit is initiated by the state against the Tribe. This precise issue was reviewed by the Ninth Circuit in *Chemehuevi Indian Tribe v. California Board of Equalization*, 757 F.2d 1047 (9th Cir. 1985), wherein an Indian tribe brought suit challenging the validity of California's cigarette tax as applied to tobacco sold by the Tribe on the reservation to non-Indian purchasers. The Board filed a counterclaim against the Tribe for the amount of taxes allegedly owed. The Ninth Circuit disallowed the counterclaim under the doctrine of tribal sovereign immunity. The court opened:

> Because of its status as a sovereign entity, an Indian tribe is generally immune from unconsented suits. 'The common law immunity of [Indian tribes] is coextensive with that of the United States . . .' This immunity is rooted in the unique relationship between the United

> States government and the Indian tribes, whose sovereignty substantially predates the constitution. 757 F.2d at 1051 (citations omitted).

The court concluded that "like the United States, an Indian tribe can consent to suit, but such consent must be unequivocally indicated." *Supra* at 1053.

From analysis of federal case law, this Court concludes that under the present rulings of the courts and the dictum contained in Supreme Court decision, in particular *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), defendants' motion to dismiss premised on the doctrine of tribal sovereign immunity must be and hereby is sustained.

IT IS SO ORDERED this 27th day of February, 1986.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex. rel., OKLAHOMA TAX COMMISSION Plaintiff, v. JAN GRAHAM and CHICKASAW NATION, Defendants.	)	No. 85-663-C

ORDER

Now before the Court for its consideration is the motion of plaintiff for new trial or, in the alternative, motion to alter or amend judgment.

The Court has reviewed the Supreme Court's opinion in *California St. Bd. of Equalization v. Chemehuevi Indian Tribe*, 106 S.Ct. 289 (1985). The Court was aware of the opinion when the February 27, 1986, Order was entered, but through inadvertence, did not include its citation in the case history of the Ninth Circuit opinion which the Supreme Court reversed in part. Nowhere in the Supreme Court's opinion is the doctrine of tribal sovereign immunity, upon which this Court's order was based, explicitely modified. The bulk of the opinion interprets a California state statute in a particular context not before this Court. This area of the law remains higly unsettled. Barring a more explicit statement by the Tenth Circuit Court of Appeals or the United States Supreme Court. this Court is not persuaded that it should modify its prior ruling.

Accordingly, it is the Order of the Court that the motion of plaintiff for new trial, or in the alternative, motion to alter or amend judgment should be and hereby is denied in all respects.

IT IS SO ORDERED this 27th day of march, 1986.

APPENDIX G

25 U.S.C. § 465

The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year; *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legisation, becomes law.

The unexpected balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be taken in the name of the United States in trust for the indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

APPENDIX H

25 U.S.C. § 501

The Secretary of the Interior is hereby authorized, in his discretion, to acquire by purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership: *Provided*, That such lands shall be agricultural an grazing lands of good character and quality in proportion to the respective needs of the particular Indian or Indians for whom such purchases are made. Title to all lands so acquired shall be taken in the name of the United States, in trust for the tribe, band, group, or individual Indian for whose benefit such land is so acquired, and while the title thereto is held by the United States said lands shall be free from any and all taxes, save that the State of Oklahoma is authroized to levy and collect a gross-production tax, not in excess of the rate applied to production from lands in private ownership, upon all oil and gas produced from said lands, which said tax the Secretary of the Interior is hereby authorized and directed to cause to be paid.

APPENDIX I

28 U.S.C. § 1441

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

APPENDIX J

Title 68 Oklahoma Statutes § 232

When any reports required under any state tax law have not been filed or may be insufficient to furnish all the information required by the Tax Commission, or when the taxes imposed by any state tax law have not been paid, the Tax Commission may institute, in the name of the State of Oklahoma upon relation of the Tax Commission, any necessary action or proceedings to enjoin such person, firm, or corporation from continuing operations until such reports have been filed or taxes paid as required, and in all proper cases, including but not limited to cases in which the evidence establishes that a taxpayer has repeatedly failed to collect and remit sales or withholding taxes, injunction shall be issued without a bond being required from the state. After an action to enjoin the operation of any person, firm or corporation has been instituted by the Tax Commission a payout agreement under which the delinquent taxpayer is to make periodic payments toward the satisfaction of the tax debt may only be entered into upon the specific request or motion of the Tax Commission. Upon a proper showing in any such action that the claim of the state for taxes is in danger of being lost or rendered uncollectible by reason of the mismanagement, dissipation or concealment of the property by the taxpayer and a request is made for the appointment of a receiver to manage the property of the taxpayer, a receiver shall be appointed.

APPENDIX K

Title 68 Oklahoma Statutes § 302

There is hereby levied upon the sale, use, gift, possession, or consumption of cigarettes within the State of Oklahoma a tax at the rate of four (4) mills per cigarette. No part of the cigarette tax receipts derived from said increase in the cigarette tax rate shall be used in determining the amount of cigarette tax collections to be paid into the State of Oklahoma building Bonds of 1961 Sinking Fund pursuant to the provisions of Se tions 57.31 through 57.43 of Title 62 of the Oklahoma Statutes.

The tax hereby levied shall be paid only once on any cigarettes sold, used, received, possessed, or consumed in this state. Such tax shall be evidenced by stamps which shall be furnished by and purchased from the Tax Commission or by an impression of such tax by the use of a metering device when authorized by the Tax Commission as provided for in this article, and said stamps or impression shall be securely affixed to one end of each package in which cigarettes are contained or from which consumed.

The impact of the tax levied by the provisions of this article is hereby declared to be on the vendee, user, consumer, or possessor of cigarettes in this state, and, when said tax is paid by any other person, such payment shall be considered as an advance payment and shall thereafter be added to the price of the cigarettes and recovered from the ultimate consumer or user. In making a sale of cigarettes in this state, a wholesaler or jobber may separately state and show upon the invoice covering such sale the amount of tax paid on the cigarettes sold. The tax shall be evidenced by appropriate stamps attached to each package of cigarettes sold. Every retailer who makes sales of cigarettes within this state to persons for use or consumption shall separately show the amount of tax paid as evidenced by appropriate stamps on each package of cigarettes sold, and the tax shall be collected by the retailer from the user or consumer. The provisions of this section shall in no way affect the method of collection of such tax on cigarettes as now provided for by existing law. As to

cigarettes packed in quantities of less than ten, for distribution as samples, payment of the tax may be made to the Tax Commission in a lump sum without affixing stamps on such packages.

APPENDIX L

Title 68 Oklahoma Statutes § 302-1(a)

In addition to the tax levied in Section 302 of this title, there is hereby levied upon the sale, use, gift, possession, or consumption of cigarettes, as defined in Sections 301 through 325 of this title, within the State of Oklahoma a tax at the rate of two and one-half (2 1/2) mills per cigarette. Such tax shall be evidenced by tax stamps as now provided for by law for other cigarette taxes, except that as to cigarette packages of less than ten cigarettes for free distribution as samples, the tax levied in this section shall be computed and paid as provided for other cigarette taxes without affixing stamps on each such package.

APPENDIX M

Title 68 Oklahoma Statutes § 302-2(a)

In addition to the tax levied in Sections 302 and 302-1 of this title, there is hereby levied upon the sale, use, gift, possession, or consumption of cigarettes, as defined in Sections 301 through 325 of this title, within the State of Oklahoma a tax at the rate of two and one-half (2 1/2) mills per cigarette. Such tax shall be evidenced by tax stamps as now provied for; however, as to cigarette packages of less than ten cigarettes for free distribution as samples, the tax herein levied shall be computed and paid as provided for other cigarette taxes without affixing stamps on each such package.

APPENDIX N

Title 68 Oklahoma Statutes § 302-3(a)

In addition to the tax levied in Sections 302, 302-1 and 302-2 of Title 68 of the Oklahoma Statutes, except as otherwise provided in this section, there is hereby levied upon sale, use, gift, possession, or consumption of cigarettes, as defined in Sections301through 325 of Title 68 of the Oklahoma Statutes, within the State of oklahoma a tax at a rate reflecting the amount of the reduction of the federal cigarette tax levied pursuant to the provisions of subsection (b) of Section 5701 of the Internal Revenue Code, scheduled to be effective October 1, 1985. However, if the federal cigarette tax is increased subsequent to said reduction but prior to January 1, 1986, and said federal cigarette tax is increased by the amount of the reduction of said tax which was effective October 1, 1985, the provisions of this section shall cease to be effective. If the federal cigarette tax is increased subsequent to said reduction but prior to January 1, 1986, and said federal cigarette tax is increased by an amount less than the amount of the reduction of said tax which was effective October 1, 1985, the tax levied pursuant to the provisions of this section shall be at a rate reflecting the difference between the amount of the reduction of federal cigarette tax which was effective October 1, 1985, and the amount of the increase of said tax. Such tax shall be evidenced by tax stamps as now provided for by law for other cigarette taxes, except that as to cigarette packages of less than ten cigarettes for free distribution as samples, the tax therein levied shall be computed and paid as provided for other cigarette taxes without affixing stamps on such package.

APPENDIX O

Title 68 Oklahoma Statutes § 1354

1. There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code,[1] an excise tax of three and one-fourth percent (3 1/4%) of the gross receipts or gross proceeds of each sale of the following:

(A) Tangible personal property;

* * * * *

(E) Printing or printed matter of all types, kinds, or character and any service of printing or overprinting, including the copying of information by mimeograph, multigraph, or by otherwise duplicating written or printed matter in any manner, or the production of microfiche containing information or magnetic tapes furnished by customers;

* * * * *

(L) Tickets for admission to or voluntary contributions made to places of amusement, sports, entertainment, exhibition, display, or other recreational events or activities, including free or complimentary admissions which have a value equivalent to the charge that would have otherwise been made;

* * * * *

(M) Charges made for the privilege of entering or engaging in any kind of activity, such as tennis, racquetball, or handball, when spectators are charged no admission fee;